

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 0:23-cv-60057-WPD

JOSHUA BERDUGO, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

GEMINI TRUST COMPANY, LLC, TYLER
WINKLEVOSS; and CAMERON
WINKLEVOSS.

Defendants.

**NOTICE OF FILING DECLARATION OF TRAVIS FREEMAN IN SUPPORT OF
DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY
CLAIMS PENDING OUTCOME OF ARBITRATION**

Defendants, GEMINI TRUST COMPANY, LLC ("Gemini"), TYLER WINKLEVOSS
("Tyler") and CAMERON WINKLEVOSS ("Cameron") (together, "Defendants"), hereby
submit the following documents, attached hereto, in support of Defendants' Motion to Compel
Arbitration and Stay Claims Pending Outcome of Arbitration:

1. Declaration of Travis Freeman, with exhibits

Respectfully submitted,

By: /s/ Dennis M. Campbell

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CASE NO.: 0:23-cv-60057-WPD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on the 8th day of February 2023 on the parties listed on and in the method specified in the Service List below.

/s/ Dennis M. Campbell

Dennis M. Campbell

SERVICE LIST

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WINKLEVOSS and CAMERON WINKLEVOSS,

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No. 0:23-cv-60057-WPD

DECLARATION OF TRAVIS FREEMAN

Travis Freeman declares pursuant to 28 U.S.C. § 1746:

1. I am over 18 and competent to make this declaration. I am a Director of Compliance at Gemini Trust Company, LLC (“Gemini”). In that role, I am familiar with, and I have access to, Gemini’s records kept in the ordinary course of business regarding the process for creating and activating accounts and accepting the terms of the Gemini User Agreement, Gemini Earn Program Terms and Authorization Agreement, and the Master Digital Asset Loan Agreement.

2. The following facts are based on my personal knowledge and review of Gemini’s records.

OVERVIEW

3. Gemini runs an online digital asset platform that allows customers to buy, sell, transfer, and store various cryptocurrencies through Gemini’s website. In order to use the Gemini platform, customers must first create a Gemini account and agree to the terms of the Gemini User Agreement.

4. Beginning February 1, 2021, one of the services offered by Gemini was a lending

program—Gemini Earn—in which registered Gemini users could elect to participate. Through the Gemini Earn program, participants such as Plaintiffs were able to make the independent, purely voluntary decision to lend digital assets to Genesis Global Capital, LLC (“Genesis”) in exchange for payment of interest.

AGREEMENTS GOVERNING THE GEMINI EARN PROGRAM

5. Participants in the Gemini Earn program agreed to three separate contracts: (1) the Gemini User Agreement (the “User Agreement”); (2) the Gemini Earn Terms and Authorization Agreement (the “Authorization Agreement”); and (3) the Master Digital Asset Loan Agreement (the “Master Loan Agreement”).

A. User Agreement

6. The User Agreement is the initial contract that governs the relationship between Gemini and participants on the Gemini platform. It is impossible to become a Gemini registered user, including a participant of the Gemini Earn program, without first agreeing to the terms of the User Agreement.

7. I have reviewed Gemini’s electronic records and those records reflect that Plaintiff Joshua Berdugo created his account at Gemini on May 12, 2021 at 4:10:40 PM EDT.

8. The procedure that was in place for creating and activating an account on Gemini’s website on the above date is similar in material respects to the procedure in place today. To open an account using an internet browser on that date, an individual had to use Gemini’s account registration page at <https://exchange.gemini.com/register>.

9. On the registration webpage, an individual was prompted and required to enter his or her full name, email address, and a password. Before proceeding further in the account creation process, the individual was required to affirmatively check a separate box next to language stating “By creating this account, you agree to our User Agreement and Privacy Policy.” The underlined

phrases “User Agreement” and “Privacy Policy” each hyperlink to the full text of the respective document on Gemini’s website so the individual can review it. A screenshot of the relevant portion of this webpage is attached as **Exhibit 1**.

10. When Plaintiff registered with Gemini (and continuing through today), it was impossible for an individual to create an account without checking the box expressly indicating agreement to the User Agreement. On that date (and continuing through today), continuing the signup process required an individual to click a button with the text “Next.” If an individual has not checked the box agreeing to the User Agreement, the “Next” button remains grayed out and inoperable.

11. Gemini maintains a log of certain actions taken by individuals in connection with their use of the Gemini platform. The log for Mr. Berdugo shows that he completed this registration process and thus accepted the User Agreement on May 12, 2021 at 4:10:40 PM EDT.

12. The User Agreement’s terms are updated from time to time, most recently on December 14, 2022. The amended User Agreement is found on Gemini’s website at <https://www.gemini.com/legal/user-agreement> and is attached as **Exhibit 2**. The User Agreement has at all times included and continues to include an arbitration clause.

13. On December 16, 2022 at 6:26 p.m., Gemini sent an email to all registered users explaining that the User Agreement changed and encouraging Gemini users to review the amended User Agreement. The underlined phrase “User Agreement” hyperlinked to the full text of the amended User Agreement on Gemini’s website so the individual could review it without logging into his/her account. The email is attached as **Exhibit 3**.

14. Further, if the user chose to log into his Gemini account, the “Sign In” page instructed as follows: “Our User Agreement has changed, including the Dispute Resolution

provision. By clicking “Sign In” below, I agree to Gemini’ USER AGREEMENT and PRIVACY POLICY.” A screenshot of the relevant portion of this webpage is attached as Exhibit 4.

15. The log for Mr. Berdugo shows that he signed on to his Gemini account and thus accepted the amended User Agreement on January 12, 2023 at 7:23:00 PM EST.

B. Authorization Agreement and Master Loan Agreement

16. To register to participate in the Gemini Earn program, a voluntary program available to existing Gemini users, a Gemini user was directed to a screen which disclosed the full text of the Authorization Agreement. The screen also asked the user to “scroll down to read this entire agreement before you accepted its terms.” The “Accept terms & continue” button was located under this text but the user could not proceed with the registration process until he scrolled through the entire Authorization Agreement. A screenshot of the relevant portion of this webpage is attached as Exhibit 5. After reaching the end of the Authorization Agreement, the user was directed to click on the button “Accept terms & continue” or “Decline.” A screenshot of the relevant portion of this webpage is attached as Exhibit 6.

17. If the user clicked “Accept terms & conditions”, another screen appeared. This screen disclosed the full text of the Master Loan Agreement and instructed the user to “scroll down to read this entire agreement before you accept its terms.” The “Accept terms & continue” button was located under this text but the user could not proceed with the registration process until he scrolled through the entire agreement. A screenshot of the relevant portion of this webpage is attached as Exhibit 7. After reaching the end of the Master Loan Agreement, the user was directed to click on the now-operative button “Accept terms & continue” or “Decline.” A screenshot of the relevant portion of this webpage is attached as Exhibit 8. If the user clicked “Accept terms & continue”, the user was then permitted to go forward with confirming its digital asset loan to

Genesis.

18. Gemini electronic records pertaining to Mr. Berdugo show that he completed this Earn registration process and thus accepted the Authorization Agreement and the Master Loan Agreement on May 14, 2021 at 4:00:01 PM EST.

19. The Authorization Agreement's terms are updated from time to time, most recently on December 14, 2022. The amended Authorization Agreement is found on Gemini's website at <https://www.gemini.com/legal/user-agreement> and is attached as **Exhibit 9**.

20. The Authorization Agreement has at all times included and continues to include an arbitration clause. The Authorization Agreement has also at all times provided, and continues to provide, that it is subject to the terms and conditions set forth in the User Agreement, which also govern the Authorization Agreement, and that, in case of conflict, the User Agreement shall control. Ex. 9 at 2.

21. The Master Loan Agreement's terms were updated on December 23, 2022. The amended Master Loan Agreement is found on Gemini's website at <https://www.gemini.com/legal/master-loan-agreement#section-master-digital-asset-loan-agreement> and is attached as **Exhibit 10**.

22. On December 23, 2022 at 6:38 p.m., Gemini sent an email to all Earn users explaining that the Master Agreement changed, encouraging Earn users to review the amended Master Loan Agreement, and affording Earn users seven (7) days to opt out of the changes. The email is attached as **Exhibit 11**. Gemini electronic records pertaining to Mr. Berdugo reflect that he did not opt out of the changes to the Master Loan Agreement. The Master Loan Agreement has at all times included and continues to include an arbitration clause.

I make this declaration under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct in support of defendant Gemini's motion to compel arbitration.

By Travis Freeman
Travis Freeman